Supreme Court, U.S.
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No. 94-1589

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1994

KENNETH B. MALPASS,

Petitioner,

vs.

THE PEOPLE OF THE CITY OF BOULDER, COLORADO
BY AND FOR THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT OF COLORADO, BOULDER COUNTY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the federal constitution violated when a zoning ordinance defines a "family" as persons who eat together in a "primary" kitchen?

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No. _____

IN THE SUPREME COURT
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OCTOBER TERM, 1994

KENNETH B. MALPASS,

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vs.

THE PEOPLE OF THE CITY OF BOULDER, COLORADO
BY AND FOR THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT OF COLORADO, BOULDER COUNTY

Petitioner, Kenneth B. Malpass, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court, State of Colorado denying a petition for writ of certiorari to review the Ruling and Order of the District Court, County of Boulder, State of

Colorado upholding the constitutionality of a zoning ordinance of the City of Boulder, Colorado.

OPINIONS BELOW

The Ruling and Order of the District Court of Colorado, Boulder County is reproduced in Appendix A.

JURISDICTION

This court's jurisdiction is invoked under Title 28, U.S.C. section 1257. [Appendix D] The Order of the Court, Supreme Court, State of Colorado denying petitioner's writ of certiorari was entered October 11, 1994. An Order of the Supreme Court of the United States dated December 30, 1994 granted petitioner to March 10, 1995 to file his petition for a writ of certiorari. [Application No. A-470]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, section 1. to the United States Constitution is set forth in Appendix B.

STATEMENT OF THE CASE

Petitioner Malpass owned a detached residential house in the City of Boulder. Malpass rented a portion of his premises as a separate apartment during two tenancies. As a result of maintaining these tenancies Malpass was convicted of violating Boulder Revised Code, ("BRC"), 9- 3-2 (a)2. (uses of land, bulk requirements, minimum lot area per dwelling unit) [Appendix C] and fined $2,000. The municipal court after trial determined Malpass had illegally maintained two dwelling units in his house and lot located in an LR-E zone.

Charges against Malpass for violating BRC 9-3-3, "Occupancy of Units" were dismissed. BRC 9-3-3, (a)(1) states:

> (a) ... no persons except the following persons shall occupy a dwelling unit:
>
> (1) Members of a family related to the head of the household by marriage, adoption, or blood, up to the second degree of consanguinity, plus one or two roomers, but only if the quarters that the roomers use do not exceed one-third of the total floor area of the

> dwelling unit and are not a separate dwelling unit; ...

It was not contested that Malpass did not at any time have more than three unrelated persons living in his house.

Malpass was convicted of maintaining illegal multiple dwelling units based upon the city's application of BRC 9-1-3 a)(21), definition of "dwelling unit" to his use of his land and house.

> (21) "Dwelling unit" means one room or rooms connected together for residential occupancy and including bathroom and kitchen facilities. Multiple dwelling units exist if there is more than one meter for any utility, address to the property, or kitchen; or if there are separate entrances to rooms which could be used as separate dwelling units; or if there is a lockable, physical separation between rooms in the dwelling units such that a room or rooms on each side of the separation could be used as a dwelling unit.

Malpass would not have been in violation of the BRC had he been able to prove the affirmative defense allowed by BRC 9-10-9 "Multiple Dwelling Units; Specific Defense".

> If a charge of violation of any provision of Chapters 9-2, "General Zoning Provisions", or 9-3, "Uses of Land", BRC 1981 is premised solely upon multiple dwelling units provisions of section 9-1-3 (a)(21), BRC 1981, it is a specific defense to such charge that, on a continuing basis, the residents of the dwelling unit share utilities and keys to all entrances to the property and that they function as a single housekeeping unit. For purposes of this section to "function as a single housekeeping unit" means to share major functions associated with residential occupancy and to share a single common kitchen as the primary kitchen.

This defense was not available to Malpass because he and his tenants did not share functions associated with residential occupancy and share a single common kitchen.

Malpass appealed his municipal court conviction to the district court claiming the city's ordinances violated the federal constitution. The district court by Ruling and Order upheld the constitutionality of the ordinances. [Appendix A] Malpass appealed the district court decision by petition for writ of certiorari to the Supreme Court, State of Colorado. The state supreme court denied his petition.

Malpass states the city's requirement that to be a legal dwelling unit he and his legal number of tenants must eat together in a primary kitchen and share other functions associated with residential occupancy violated his rights to substantive due process and equal protection of the law as guaranteed him by the Fourteenth Amendment of the United States Constitution. Petitioner Malpass requests the subject ordinances be struck down as unconstitutional.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons:

1. To resolve a conflict in the circuits over the viability of substantive due process claims in land use cases.

2. To resolve a conflict in this Court over the viability of equal protection claims in land use cases.

3. To resolve the conflict between this Court's strict review of taking clause claims compared with its

deferential review of other constitutional claims in land use cases.

Viability of Substantive Due Process Claims in Land Use Cases

There is conflict in the circuits whether the right to substantive due process review exists in land use cases. The district court in Pearson v. City of Grand Blanc , 756 F. Supp 314, 316 (E.D.Mich. 1991), a land use case, applied the rule of Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) that the due process clause is not a substitute for more specific constitutional protections. The Sixth Circuit reviewed the district court's decision in Pearson , see 961 F.2d 1211 (6th Cir. 1992). The Sixth Circuit rejected the district court's "rationale that all federal cases should be treated as "takings". It continued "After exhaustive research, we find that this proposition - while it has the undoubted salutary advantage of minimizing the involvement of federal court in local zoning - cannot be reconciled with current

precedent." Pearson , 961 F.2d 1211, 1214 (6th Cir. 1992).

Yet clearly, the Tenth Circuit has adopted the rationale of the district court rejected by the Sixth Circuit in Pearson. The Tenth Circuit in Miller v. Campbell County, 945 F. 2d 348, 352 (10th Cir. 1991) held "It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause." The Miller court at 945 F.2d 352-353, n6, cited Graham v. Connor, 490 U.S. 386.

The gist of the argument against the "taking" clause subsuming the due process protections of the Fifth and Fourteenth Amendments is well expressed by dicta of Judge Posner in Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

> One might have thought that the takings clause would occupy the field of constitutional remedies for governmental actions that deprive people of their property, and hence that the plaintiff's waiver of their takings claim would drag their due process claims down with it. But this is not correct; pushed to its

> logical extreme, the argument would read "property" out of the due process clause of the Fifth and Fourteenth Amendments. Even limited to claims of denial of substantive due process the argument may fail. Rather than being viewed simply as a limitation on governmental power the takings clause could be viewed as the source of a governmental privilege: to take property for public use upon payment of the market value of that property, ...

Assuming the holding in Pearson (6th Cir.) controls, not the holding in Miller (10th Cir.); the next question is what is the standard of review for substantive due process land use claims?

What is the standard of review ?

The Pearson court (6th Cir.) walked through the circuits to resolve the question of standard of review concluding "Our research further reveals the circuits to be deeply divided concerning the theories to be employed in federal court cases challenging zoning." Pearson, 961 F.2d 1214. Petitioner Malpass reiterates the work of the Pearson court (6th Cir.) collating the law and cataloging the various approaches.

The Pearson court at 961 F.2d 1215-1216 discussed "The Many Meanings of Substantive Due Process". At 1215 it stated as a general definition: "The doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process." citing n16, comment, *Development in the Law-The Constitution and the Family*, 93 Harv.L.Rev 1156, 1166 (1980)(case citations omitted).

The Pearson definition can be contrasted with Judge Posner's comments in Coniston Corp., 844 F.2d at 466:

> ... Justice Stevens tried - though in the context of judicial review of an ordinance, rather than of an individual decision applying an ordinance - in his concurring opinion in *Moore v. City of East Cleveland*, supra, 431 U.S. at 520, 97 S. Ct. at 1496, where he suggested that an ordinance that is not "shown to have any 'substantial relation to the public health, safety, morals or general welfare' " and that "cuts deeply into a fundamental right associated with the ownership of residential property" violates the Constitution.

Clearly, the Pearson court had ample reason to state:

> The circuits are in substantial disagreement on the role of the federal court in reviewing zoning claims of this kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, [citing n22, *Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S.Ct. 447, 448, 72 L.2d. 842 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373, 47 S.Ct. 114, 115, 71 L..Ed. 303 (1926) (other citation omitted)] it has never laid down definitive standards of review.

Pearson, 961 F.2d 1217.

The Pearson court at 961 F.2d 1217-1218 discussed the "View of the Various Circuits" synopsized here for brevity (all citations are omitted):

First Circuit: "shows a great reluctance to interject the federal court into local zoning matters, holding that substantive due process is not violated by local zoning even when accompanied by claims of purposeful malicious obstructions of a landowner's rights."

Second Circuit: "while proclaiming that "purely local zoning disputes are generally matters which are best left to municipal and state agencies to resolve, at

one time would grant relief in extreme cases, as where an applicant has a clear property right to a certificate of occupancy but the defendants refuse to issue it for political reasons." More recently the Second Circuit has denied "review of a zoning decision, where the zoning authority was vested with any discretion, on the ground that the applicant lacked a protected property right."

Third Circuit: "will grant relief on the basis of substantive due process where the zoning decision is irrational in the strict sense, or prompted by invidious political or discriminatory motives."

Fourth Circuit: "agrees with the Third; the leading cases involve political or religious discrimination."

Fifth Circuit: "views with strong disfavor the idea of federal courts being drawn into local zoning disputes, and classifies all zoning actions, even those pertaining to individual piece of property, as legislative. This means that such actions can be set aside only under criteria

that would justify invalidating a statue. Also, factual issues are reviewed under the criteria for legislative facts.

Sixth Circuit: "has recently classified even zoning enactments of a general nature as administrative/adjudicatory, where zoning changes to individual parcels of land, not reflected in the initial publications of the ordinance, occur. ... An earlier decision ... used traditional ... "arbitrary and capricious" language and indicated that scrutiny would be of the legislative variety. A recent case ... holds that local zoning may be set aside by a federal court only if it "shock the conscience."

Seventh Circuit: "strongly disapproves of federal courts' reviewing local zoning matters. It holds, contrary to the Sixth Circuit, that any action by the local legislative body on a zoning matter ... is legislative. ... [T]he presence of protectionist or parochial motives does not render the decision irrational, so long as there is some relation to land use. Since the local legislature is

acting legislatively, it need not make a finding of fact, ... and review of factual findings determinations by the federal court is extremely deferential as with any legislative finding. ..."

Eighth Circuit: "[The] judges are in disagreement among themselves as to the correct approach to federal review of local zoning, and a concurring opinion in an en banc case opines that the succinct majority opinion overruled the leading Eight Circuit case by stating: "whether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit."

Ninth Circuit: "will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and any relationship to a proper zoning goal, such as prevention of traffic congestion, will be sufficient."

Tenth Circuit: "imposes a strict property right test similar to the Second Circuit. If that test is met, it will consider whether the zoning was arbitrary and capricious."

Eleventh Circuit: "approach is similar to the Ninth. Indeed the Ninth Circuit relied on an Eleventh Circuit decision."

Petitioner asks this Court to clarify the conflict among the circuits as to whether a federal court substantive due process claim exists in land use cases, and if yes, what is the standard of review to be applied.

Petitioner raised claims of federal unconstitutionality in his state court trial. The state court review obtained by Petitioner was clearly dependent upon state court judges' view of controlling federal law. See Ruling and Order at Part II, Appendix A. It is uncontested the district court, relying upon to Village of Belle Terre v. Borass, 416 U.S. 1, 94 S. Ct. 1536, 39 L.Ed.2d 797 (1974)[Appendix A, Ruling and Order at 8], applied

its own vision as to the city's expressed goals by *reading into them* the intent to "maintain single family neighborhoods" even though "the ordinance does not use those particular words." [Appendix A, Ruling and Order, n2 at 7] . The result of this judicial effort is that, notwithstanding the absence of a density/nuisance rationale, Petitioner will be deemed to have a legal dwelling if he and his tenants "share major functions associated with residential occupancy" and "share a single common kitchen as the primary kitchen." See BRC 9-10-9 "Multiple Dwelling Units; Specific Defense", supra at 4-5 .

Petitioner disagrees with the rationale of the district court in upholding the constitutionality of the city's ordinances. Given the conflict among the circuits as to the standard of review to be applied to Petitioner's claims, this Court should grant this petition so it can clarify the type review to which Petitioner's claims are entitled.

Viability of Equal Protection Claims in Land Use Cases

This Court has defined the Equal Protection Clause to require: "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyer v. Doe*, 457 U.S. 202, 216 (1982)." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The Cleburne Court at 437 U.S. 440 stated judicial standards, adopted in the absence of congressional directive, to be used to decide the validity of state action challenged as denying equal protection.

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to legitimate state interest. ... When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, ..., and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process. (internal citations omitted)
>
> Cleburne, 437 U.S. 440.

The Cleburne Court stated this general rule gives way when a statute classifies by race, alienage, or national origin or when state law impinges on personal rights protected by the Constitution. These circumstances require strict scrutiny and will be sustained only if they are tailored to serve a compelling state interest. Cleburne, 437 U.S. 440. The Cleburne Court citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) held:

> The lesson of *Murgia* is that where individuals in the group affected by the law have distinguishing characteristic relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interest should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.
>
> Cleburne, 473 U.S. 441.

The Cleburne Court then proceeded to overrule the Court of Appeals holding that mental retardation is

a quasi-suspect classification calling for more exacting judicial review than is normally accorded economic and social legislation. 473 U.S. 442. At part IV of its opinion (472 U.S. 447) the Cleburne court still obtained the fairer outcome inherent in the lower court decision, albeit by a different path.

The Cleburne Court upon review of "the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded", 473 U.S. 447, concluded "... that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, ...", 473 U.S. 450. The bulk of the Court's opinion in part IV, 473 U.S. 447-450, was devoted to debunking the various rationales of the City of Cleburne as to why its special permit requirement for homes for the mentally retarded was an appropriate exercise of its police powers to make socio/economic legislation . See also Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D.Fla.

1987)(zoning restriction for housing of the elderly; court relied upon Cleburne).

Petitioner also refers the Court to the decisions in Village of Belle Terre v. Borras, 416 U.S. 1 (1974), and Moore v. East Cleveland, 431 U.S. 494 (1977). Belle Terre upheld a zoning ordinance that restricted the number of unrelated persons that could live together in the Village of Belle Terre. This case is read to mean that restrictions on the number of unrelated persons who can live together do not implicate "fundamental" rights and these restrictions are valid land use legislation addressed to family needs. 416 U.S. 7-9. On the other hand in Moore the Supreme Court struck down legislation that differentiated between a grandmother's grandchildren. The distinction between Moore and Belle Terre, as discussed in Moore was that the Belle Terre ordinance "affected only *unrelated* individuals". Moore, 431 U.S. 498. The City of East Cleveland's ordinance affecting Mrs. Moore was not accorded the usual judicial

deference because of its "intrusive regulation of the family". 431 U.S. 499. The Moore court found personal choice in matters of marriage and family life to be a liberty protected by the Due Process Clause of the Fourteenth Amendment. See 431 U.S. 499, and cases cited therein.

East Cleveland's ordinance was struck down because the ordinance's described purpose, prevention of overcrowding, had "a tenuous relation to alleviation of the conditions mentioned by the city." 431 U.S. 500. Simply, the Moore court concluded that regulations affecting "family" implicated a liberty protected by the Due Process Clause, and the described purpose of the ordinance would not be served by discriminating between Mrs. Moore's grandchildren.

The Supreme Court has obviously adopted different views of equal protection depending upon who the affected party was. The college students in

Belle Terre did not merit the sympathies the Court accorded the group home residents in Cleburne. Petitioner believes his case is controlled by Cleburne because there is no rational basis for the City of Boulder's requirement that Malpass and his tenants share a common kitchen to legally occupy his premises. However Petitioner believes it necessary for this Court to take this case to clarify the standard of review to be applied equal protection claims like those now made by him.

Conflict Between this Court's Strict Review of Taking Clause Claims Compared with Deferential Review of Substantive Due Process Claims

This Court in Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 107 S.Ct. 3141 (1987) stated in support of its rationale for granting review:

> ... [T]he question becomes whether requiring [the land] to be conveyed as a condition for issuing a land-use permit alters the outcome. ... Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the

former "substantially advance" the latter. (citing to n3)

The discussion at n3 countered Justice Brennan's opinion that "a State's exercise of police power demands only that the State" could have rationally have decided "that the measure adopted might achieve the State's objective." (483 U.S. at 843). The majority at n3, 483 U.S. 834 stated:

> To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Argument as to "legitimate of state interest" arises in both substantive due process cases and taking cases. Petitioner states the city did not have "legitimate state interest" to uphold the complained of ordinances at issue here. Based upon the language in the foregoing quote, the majority view is that in a taking case the review focuses on whether the legislation substantially

advances a legitimate state interest. But in cases involving claims of violation of the substantive due process clause, by implication the Nollan majority's opinion at n3 states the review focuses on whether the state could have rationally decided the measure adopted would achieve the objective.

The recent line of Supreme Court cases Nollan, 483 U.S. 825; Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992); and Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) indicate a stricter federal judicial role in review of taking cases. The last review of a substantive due process/land use case by this Court was in Nectow v. City of Cambridge, 277 U.S. 183 (1928). It is not a credible proposition that property rights and property interests are less at risk from violations of the substantive due process clause than they are from violations of the taking clause. This Court's self-imposed abstinence from comment regarding substantive due process claims in land use cases has

resulted in vacuum now filled by conflict. See supra at 9, What is the standard of review?, discussion regarding conflict among the circuits.

A review of the property rights and interests at stake in the takings cases compared with Petitioner's claims is instructive. In Nolan conditions of the California Coastal Commission were struck down because this Court did not like the reason for the condition. The economic loss in Nolan was subjective in that the complained of "taking" was an easement that would allow the public access to the owner's beach front property (essentially leave their footprints in his sand).

The Dolan opinion generated important debate, but argument nonetheless, as to the nature of the economic loss, if any, by the complainant.

> Even if Dolan should accept the city's conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied "just compensation" since it would be appropriate to consider the receipt of that benefit in any calculation of "just compensation".

114 S.Ct. 2328 (dissent, Justice Stevens, joined by Justices Blackmon and Ginsburg)

Petitioner Malpass has suffered loss of property interest and rights. The city's ordinances Malpass claims are unconstitutional resulted in the city inspector's investigation to learn the contents of his cabinets and closets, where Malpass and his tenants slept and ate, with whom they ate, what doors were locked and unlocked, and who had keys to these doors. Malpass suffered a quasi-criminal conviction in municipal court for violation of the zoning ordinance and paid a $2,000 fine.

Absent federal suit by Petitioner against the city and its officials pursuant to 42 U.S.C. section 1983 [Appendix D], Malpass' state court defense based upon claims of unconstitutionality under the United States Constitution was his only procedural avenue for review of his federal constitution claims. Clearly substantive due process review of land use cases in the federal

courts is in a state of conflict. Petitioner argues this lack of standard resulted in the erroneous, confused state court orders that upheld his conviction.

Petitioner requests the Court review this matter in order to clarify the standard of review allowed in "taking" clause claims compared with "substantive due process" claims as the same affect this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the order of the District Court of Colorado, Boulder County.

DATED: March 22, 1995.

Respectfully submitted,

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Daniel R. Mandelker

Julianne C. McCabe

APPENDIX A

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC170
CERTIORARI TO THE DISTRICT COURT,
BOULDER COUNTY, 93CR359
MUNICIPAL COURT, CITY OF BOULDER, Y15391

ORDER OF THE COURT

KENNETH B. MALPASS,

Petitioner,

v.

THE PEOPLE OF THE CITY OF BOULDER BY AND FOR THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the District Court of Boulder County, and after review of the record, the briefs, and the judgment of said District Court,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 11, 1994.

SEAL

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Supreme Court
State of Colorado
Certified to be a full,
true and correct copy

Clerk of the District Court
Boulder County District
Court
P.O. Box 4249
Boulder, CO 80306-4249

OCT 11 1994

MAC V. DANFORD
COURT
SEAL By Valeri Reisen
Deputy Clerk

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Action No. 93 CR 359 Division 4

RULING AND ORDER

KENNETH B. MALPASS,

Defendant/Appellant,

v.

THE PEOPLE OF THE CITY OF BOULDER BY AND FOR THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff/Appellee.

On March 1, 1994, the following actions were taken on the above-captioned case. The Clerk is directed to enter these proceedings in the registry of actions.

This case comes before the court on the defendant's appeal of his convictions for two violations of Boulder Revised Code § 9-3-2 for maintaining two dwelling units on a lot less than 14,000 square feet in size in a Low Density Residential Established ("LR-E") zone.

I.

The essential facts are as follows. The defendant owned property located in Boulder in a Low Density Residential Established ("LR-E") zone. The house located on

the property contained two separate apartments connected by a locked interior door. The apartments had separate kitchen facilities and bathrooms, and separate entrances from the outside. During the times relevant to the prosecution, one of the units was occupied by the defendant, and the other unit was occupied by tenants who paid the defendant monthly rent pursuant to a lease agreement.

The lot owned by the defendant was less than 14,000 square feet in size. Boulder Revised Code § 9-3-2, "Schedule of Minimum Bulk Requirements," requires at least 7,000 square feet per dwelling unit in an LR-E zone. B.R.C. § 9-3-2 (a) (2). "Dwelling unit" is defined in B.R.C. § 9-1-3 (a) (21), which provides:

> "Dwelling unit" means one room or rooms connected together for residential occupancy and including bathroom and kitchen facilities. Multiple dwelling units exist if there is more than one meter for any utility, address to the property, or kitchen; or if there are separate entrances to rooms which could be used as separate dwelling units; or if there is a lockable, physical separation between rooms in the dwelling unit such that a room or rooms on each side of the separation could be used as a dwelling unit.

Following a jury trial, the defendant was convicted in Municipal Court of two violations of Boulder Revised Code § 9-3-2.

The Code provides a specific defense when the charge is premised upon the multiple dwelling units provisions of § 9-1-3 (a) (21).

> ...it is a specific defense to such charge that, on a continuing basis, the residents of the dwelling unit share utilities and keys to all entrances to the property and that they function as a single housekeeping unit. For purposes of this section, to "function as a single housekeeping unit" means to share major functions associated with residential occupancy and to share a single common kitchen as the primary kitchen.

B.R.C. § 9-10-9. This defense was not available to the defendant, due to the fact that he and his tenants did not function as a single housekeeping unit.

II.

The defendant challenges the constitutionality of the zoning ordinance on several grounds, invoking both substantive due process and equal protection. Zoning ordinances are presumed valid, and a party challenging the constitutionality of a zoning ordinance ordinarily bears the burden of proving the invalidity beyond a reasonable doubt. Zavala v. City and County of Denver, 759 P.2d 664, 670 (Colo. 1988); Price v. City of Lakewood, 818 P.2d 763, 766 (Colo. 1991).

The determination of the applicable standard of review turns on the facts of each case. If an ordinance restricts a

fundamental right or creates a suspect classification, the heightened "strict scrutiny" standard applies, and the government bears the burden of showing that the regulation is "suitable tailored to serve a compelling state interest." Id. ; Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2 531 (1977). If an ordinance does not infringe upon fundamental rights or create a suspect classification, the less demanding rationality standard applies, and the challenging party bears the burden of showing that the ordinance is not rationally related to a valid state interest. Id.

The defendant does not assert that the ordinance creates a suspect classification. However, the defendant asserts that the zoning ordinance deprives him of his fundamental rights of privacy and association. He argues that the zoning ordinance regulates the manner in which he and his tenants choose to order their household and that the ordinance somehow *requires* them to live a communal lifestyle.[1] The defendant does not assert that the ordinance interferes with his familial relationships, but that it interferes with his right not to have

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[1] It is clear that the so-called "common kitchen" defense is not intended to reach this absurd result; rather, the defense recognizes that although a home may have some of the physical characteristics of a "multiple dwellings" it may be utilized as a single dwelling.

familial relationships; similarly, he has not asserted a right to associate, but a right not to associate.

It is doubtful that these assertions implicate fundamental rights. However, even if the defendant does have a fundamental right to live separately from his tenants, he has not shown how the ordinance infringes upon that right. The defendant's interest in living separately from his tenants is not infringed upon, because he can live completely alone if he chooses to. The only interest the ordinance directly infringes upon is the defendant's interest in making a profit by renting out a separate apartment in his home. The defendant's argument is really nothing more than a reformulation of the argument that a person should be able to do whatever he wishes with his property. Neither the right to free association not the right to privacy has ever been given this broad meaning. Because the defendant's rights to free association and privacy are not implicated, the proper standard of review is the rationality test.

The question, then, is whether the ordinance is rationally related to a legitimate state interest. The legislative intent in enacting the ordinance is expressed in B.R.C. § 9-1-1. The following purposes are particularly relevant to the case at hand:

This title is intended to accomplish the following purposes:

> .... (b) Prevent overcrowding of land, overtaxing of public facilities and services, unregulated growth, poor quality development, waste and inefficient use of land, danger and congestion in travel and transportation, and any other use or development that might be detrimental to the stability of the city;
>
> .... (e) Preserve the character and stability of neighborhood and conserve property values by encouraging the most appropriate uses of land within zoning districts;...

B.R.C. § 9-1-1.

The defendant does not assert that these are not legitimate state interests. Instead, the defendant argues that the "nexus" between the state interests and the means used to accomplish them is insufficient. Specifically, the defendant challenges the rationality of an ordinance which would allow a number of people to live in his home in a single dwelling (i.e., with a single common kitchen), but will not allow the same number of people to live in his home in multiple dwellings.

It is rational to conclude, as the City apparently did, that the number of people in a neighborhood will increase *generally* with increasing numbers of dwellings per lot. The city also regulates the number of persons per dwelling, in B.R.C. § 9-3-3, "Occupancy of Units." Assuming a maximum

number of persons per dwelling, it is rational to conclude that more dwellings will mean more people. While in the defendant's case, it may be that his living arrangement did not result in a large number of people living in his home, this does not render the ordinance irrational.

Furthermore, prevention of overcrowding is not the sole objective of the ordinance. The defendant's argument fails to take into account the legitimate state interest expressed in § 9-1-1 (e), that of preserving the character and stability of neighborhoods and conserving property values. The multiple dwelling provisions of the code are a rational way to help further this purpose.

The zoning ordinance does not create a suspect class, nor does it implicate fundamental rights. Because there is a legitimate state interest in preventing overcrowding and in preserving the "single family" character of neighborhoods[2], and because the ordinance is a rational way to accomplish these goals, the ordinance does not violate substantive due process or equal protection. Rademan v. City and County of

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[2] The defendant takes the position that the ordinance is not intended to maintain "single family" neighborhoods, presumably because the ordinance does not use those particular words. However, it is clear that the ordinance is intended to accomplish this goal, through the preservation of "single dwelling" neighborhoods and the limitations set forth in B.R.C. § 9-3-3, "Occupation of Units."

Denver, 186 Colo. 250, 526 P.2d 1325 (1974); Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

III.

The defendant also challenges the ordinance as being vague, overbroad, and arbitrarily enforced, and therefore a violation of due process.

> [An ordinance] that forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application violates ...[due process]. Conversely, [an ordinance] satisfies the requirements of due process when it provides fair notice of the conduct that has been determined to be unlawful.

Smith v. Charnes, 728 P.2d 1287, 1290 (Colo. 1986).

The defendant asserts that the use of the word "or" in the definition of multiple dwelling units creates an ambiguity, since it is not clear whether the word is intended to be used in the disjunctive or the conjunctive. The argument continues that if the parts of the definition are to be read as disjunctive, then the statute is overbroad and arbitrarily enforced. Boulder Revised Code § 9-1-3 (a) (21) states in pertinent part:

> ...Multiple dwelling units exist if there is more than one meter for any utility, address to the property, or kitchen; or if there are separate entrances to rooms which could be used as separate dwelling units; or if there is a lockable, physical separation between rooms in the dwelling uniitssuch that a room or

> rooms on each side of the separation could be used as a dwelling unit.

It is clear that the word "or" in the definition is used in the disjunctive. Both the context and the use of punctuation in the definition makes the meaning of the word "or" unambiguous. The definition is not so vague that persons of common intelligence must necessarily guess as to its meaning or differ as to its application. The ordinance puts people on fair notice that they are subject to charges for violating the multiple dwelling provision if any one of the listed conditions is present.

In further support of his argument, the defendant relies on the definition of "kitchen" contained in B.R.C. § 1-2-1 (80):

> "Kitchen" means any part of a room or dwelling unit that can be used for the preparation of food that includes one or more of the following: a refrigerator, cooking device, food storage cabinet, kitchen sink, or dishwasher.

The defendant states that "any house in the city that has a cooking mechanism or food storage cabinet outside of its primary kitchen could be found to be two dwelling units."

This argument completely ignores the specific defense contained in B.R.C. § 9-10-9, which makes it clear that if members of a household function as a unit and share one primary kitchen, they are not guilty of violating the multiple

dwelling provisions of the code. The inclusion of this defense in the code prevents the ordinance from being overbroad, and helps prevent arbitrary enforcement by law enforcement officials.

The ordinance is not so vague that people of common intelligence must necessarily guess as to it meaning; people are on fair notice of the conduct prohibited. Further, the ordinance is not overbroad or arbitrarily enforced. Therefore, the ordinance does not violate due process. *See* Price v. City of Lakewood, 818 P.2d 763 (Colo. 1991).

IV.

Finally, the defendant asserts numerous other bases of error, which may be addressed briefly.

The defendant claims that his right to a jury was denied by the use of a six-person jury, rather than a twelve-person jury. A twelve-person jury is not constitutionally required in non-capital cases. *See* People ex rel. Hunter v. District Court, 634 P.2d 44 (Colo. 1981). The Colorado Municipal Court Rules of Procedure, Rule 223 (b) provides that the jury, when granted, shall consist of three jurors, unless a greater number, not to exceed six, it requested by the defendant. *See also* C.R.S. § 16-10-109. The defendant's right to a jury trial was not denied by the use of a six-person jury.

The defendant also claims that his right to a jury trial was denied by the trial court's refusal to give a what is commonly called a "jury nullification" instruction. The defendant claims that a jury has a right to judge the correctness of the law as well as the facts. However, a jury has no such "right"; in fact, a jury is sworn to follow and apply the law as instructed. A jury may have the "power" to disregard the law, but that is only because the structure of our jury system precludes review of a jury decision on that basis. The trial court was correct to refuse to give a jury nullification instruction. *See* U.S. v. Grismore, 546 F.2d 844, 849 (10th Cir. 1976).

The defendant also claims that his right to counsel was denied when the trial court denied his motion for a continuance on the date of the trial and required him to proceed without his attorney who had just entered an appearance and was not present. Whether to grant a continuance is a matter left to the sound discretion of the trial court. People v. Saavedra, 184 Colo. 90, 518 P.2d 283 (1974). The defendant had ample opportunity to secure counsel and request a continuance prior to the date of the trial. Furthermore, the defendant is himself a licensed attorney in the state of Colorado. The trial court did not abuse its discretion in denying the continuance.

The defendant's remaining assignments of error are not sufficiently identified or briefed to warrant review.

V.

For the forgoing reasons, the judgment of the Municipal Court is AFFIRMED.

DONE IN CHAMBERS this March 3, 1994.

Joseph Bellipanni, District Judge

cc:
Julianne McCabe,
Attorney for Appellant

Claire M. Largesse,
Office of the City Attorney

Honorable Judge James Kozlowski,
Municipal Court

APPENDIX B

AMENDMENT XIV.
UNITED STATES CONSTITUTION

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

9-3-2

9-3-2 Schedule of Minimum Bulk Requirements.

No person shall use any land within the city authorized by Section 9-3-1, B.R.C. 1981, except according to the following bulk requirements for lot area, parking, open space, setbacks, and height, unless modified through a special review under Section 9-4-9, B.R.C. 1981, a non-conforming review under Section 9-4-10, B.R.C. 1981, a height review under Section 9-4-11, B.R.C. 1981, a planned unit review under Section 9-4-12, B.R.C. 1981, or a high density overlay zone review under Section 9-4-13, B.R.C. 1981, or granted a variance under Section 9-2-6, B.R.C. 1981.

(a) Established Districts:

ZONING REQUIREMENT	RR-E	ER-E	LR-E	MR-E	HR-E	TB-E	CB-E	RB-E	I-E	P-E	A-E	MH-E
1. Minimum Lot Area (sq.ft.)	30,000	15,000	7000	6000	6000	6000	6000	6000	7000	7000	5 acres	3500
2. Minimum Lot Area per Dwelling Unit (sq.ft.)	30,000	15,000	7000	3500	1600(L)	1600	1600	1600	7000	7000	5 acres	4350
3. Minimum Square Feet of Useable Open Space per Dwelling Unit(h)	n/a	n/a	n.a	n.a	600	600	400	n/a	n/a	n/a	n/a	600
4. Minimum Number of Off-Street Parking Spaces per Dwelling Unit(a)(i)	one	one	one	for detached dwelling units, 1 space; for attached dwelling units, 1 bedroom requires one space;(j) 2 bedrooms require 1.5 spaces, 3 bedrooms require 2 spaces, and 4 or more bedrooms require 3 spaces							one	1
5. Minimum Number of Off-Street Parking Spaces per Square Feet of Floor Area for												

their Accessory Uses(a)(b)	1:300	1:300	1:300	1:300	1:300	1:300	1:300*	1:400	1:400	1:300	1:400	
6. Minimum Front Yard Landscaped Setback for all Principal Buildings & Uses (ft.)	25	25	25	25	25	20	20	20	20	25	25	*
7. Minimum Front Yard Setback for all Accessory Buildings and Uses (ft.)(k)	55	55	55	55	55	55	55	55	55	55	55	*
8. Minimum Side Yard Landscaped Setback from a Street for all Buildings and Uses (ft.)(c)	25	25	12.5	12.5	12.5	15	15	15	15	15	25	*
9. Minimum Side Yard Setback from an Interior Lot Line for all Principal Buildings and Uses (ft.)	15	10	5	5	10	10	12, if any side yard is provided(d)			10	15	*
10. Minimum Side Yard Setback from an Interior Lot Line for all Accessory Uses (ft.)	15	10	3, if any side yard is provided(d)				12, if any side yard is provided(d)			3, if any side yard is provided(d)		*

*Mobile home park development standards and bulk requirements are found in Sections 9-3-2 and 9-3-40, B.R.C. 1981, and in Chapter 10-12, B.R.C. 1981.

NOTE: footnotes (a) through (o) are found following Subsection 9-3-2(c), B.R.C. 1981.

APPENDIX D

28 U.S.C. section 1257. State court; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title , right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, any commission held or authority exercised under, the United States.

42 U.S.C. section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.